Supreme Court, U. S.
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APPENDIX

In The

Supreme Court of the United States

October Term, 1978

No. 78-1155

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

LARRY D. JONES,

Appellee.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DOCKETED JANUARY 22, 1979

[redacted]URISDICTION Postponed

APRIL 23, 1979

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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PROBABLE JURISDICTION NOTED

APRIL 23, 1979

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RELEVANT DOCKET ENTRIES

Date		Proceedings
1975		
Nov 12	1	Order (WKU) granting Leave to Proceed In Forma Pauperis. Copy mailed to counsel of record.
Dec 2	7	Defendants' Answer.
1976		
Feb 19	12	Plaintiff's motion to certify class action.
Mar 17	17	Joint Stipulation of Facts.
Mar 18	18	Memorandum and Order (WKU) granting motion to certify class action (No. 12) and action shall proceed as a Class Action. Copy mailed to counsel of record.
Apr 30	27	Motion of Larry Jones to intervene as plaintiff w/copy of Complaint.
May 21	32	Complaint of Intervenor Larry Jones, with certificate of service on the Attorney General of the State of Nebraska. Mailed copy of Order — Filing No. 29 to Attorney General, and delivered copy to Lincoln Legal Services.
Aug 3	34	Entered Defendants' Motion for Summary Judgment filed 8-2-76.
Aug 26	40	Entered Memorandum and Order (DPL) (WKU) (RVD) filed 8-24-76 denying Defendants' motion for summary judgment (No. 34). Copy mailed to counsel of record.
Sep 1	41	Defendants' Motion to Amend the Order Denying Summary Judgment.
Sep 9	42	Memorandum and Order (WKU) denying Defendants' Motion to Amend Order Denying Summary Judgment (No. 41). Copy mailed to counsel of record.
Nov 22	53	Transcript of Testimony on 11-12-76.
1977		
Sep 12	57	Memorandum of Decision (WKU), (DPL), (RVD).

58 Order (WKU), (DPL), (RVD), that William McKinley Hines is dismissed as a plaintiff-intervenor; and that counsel submit within 15 days, specific proposals in accordance with Memorandum.

Copy mailed to counsel and Charles Miller of order and memorandum.

Oct 14 61 Judgment (WKU), (DPL), (RVD), that 83-180(1), Nebraska R. R. S. 1943 is declared to be unconstitutional as applied to plaintiffs; that this lawsuit is moot as to plaintiff Charles Miller and plaintiff-intervenor William George Foote, and the action dismissed as to them; and that defendants are enjoined from transferring plaintiff-intervenor Larry D. Jones from Nebraska Penal and Correctional Complex to the Lincoln Regional Center, except under conditions prescribed in this Judgment.

Copy mailed to plaintiffs of record, counsel of record.

Oct 21 62 Defendants' Notice of Appeal with certificate of service on 10-21-77.

Dec 22 63 Order (WKU) that Clerk of this Court transmit the original pleadings, transcript, and exhibits to Supreme Court of the United States.

Copy mailed to counsel of record.

Dec 28 Original file, transcript, and one exhibit mailed to Clerk of Supreme Court of the United States.

1978

Mar 9 64 Entered Certified Copy of Order, Supreme Court of the United States, filed 3-6-78, noting probable jurisdiction.

Jun 22 67 Certified copy Judgment, Supreme Court of the United States, remanding for consideration of question of mootness; and vacating District Court Judgment.

Oct 27 70 Memorandum of Decision Regarding Mootness (DPL) (WKU) (RVD).

71 Judgment (DPL) (WKU) (RVD) declaring State Statute unconstitution as applied to plaintiffs; declaring lawsuit moot as to plaintiffs Miller and Foote and dismissing action as to them; and enjoining defendants from transferring plaintiff Jones to Lincoln Regional Center, except by certain procedure.

Copy mailed to counsel of record.

Nov 22 72 Entered Defendants' Notice of Appeal filed 11-21-78.

Copy mailed to Tom Wurtz and Larry Jones.

Entered Defendants' brief on question of mootness received by Judge Urbom on 7-17-78.

Entered Plaintiffs' brief on question of mootness received by Judge Urbom on 7-19-78.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil Action No. CV 75-L-172

CHARLES MILLER, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

JOSEPH VITEK, individually and as Director of the Department of Corrections; ROBERT PARRATT, individually and as Warden of the Nebraska Penal Complex; JACK CLEAVINGER, individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M. D., individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, individually and as head of the Security Building, Lincoln Regional Center,

Defendants.

COMPLAINT

INTRODUCTION

This is a civil rights action on behalf of plaintiff and all other persons held at the Lincoln Regional Center,

Security Building, who have been transferred from the Nebraska State Penal Complex, and all persons who are presently subject to similar transfer pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971). Plaintiff seeks a declaration that NEB. REV. STATS. §§ 83-179, and 83-180 (Reissue 1971) on their face and as applied by the defendants are unconstitutional for the reason that they deny plaintiff and the class he represents, due process and equal protection of the law. Plaintiff seeks injunctive relief in the form of an order that they be released from custody at the Lincoln Regional Center, Security Building, and returned to the Nebraska Penal Complex.

JURISDICTION

1. Plaintiff, individually and on behalf of all other persons similarly situated, brings this action under the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is authorized by 28 U. S. C. § 1343 (3) and (4).

2. Plaintiff seeks declaratory relief pursuant to 28 U. S. C. §§ 2201 and 2202 and injunctive relief pursuant to 42 U. S. C. § 1983.

THREE-JUDGE COURT

3. This is a proper case for determination by a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284 since plaintiff seeks an injunction to restrain defendants, who are state officials, from the enforcement, operation and execution of state statutes of state-wide applicability on the ground that said state statutes are contrary to the Constitution of the United States.

PLAINTIFF

4. The plaintiff, CHARLES MILLER, is an 18 year old, black, male resident of Lincoln, Nebraska. He is a

United States citizen and a single person with no one dependent on him for support. Plaintiff was convicted of unlawful flight to avoid arrest while operating a motor vehicle in Douglas County, and was sentenced to the Nebraska Penal Complex for one to three years. He was received at the Nebraska State Penal Complex March 25, 1974, and was subsequently transferred to the Lincoln Regional Center, Security Building, May 31, 1974. Plaintiff is presently being held against his will at the Lincoln Regional Center, Security Building, pursuant to the transfer under NEB. REV. STATS. §§ 83-179 and 180 (Reissue 1971).

DEFENDANTS

5. Defendant JOSEPH VITEK, is the Director of the Nebraska Department of Corrections.

6. Defendant ROBERT PARRATT is the Warden of the Nebraska Penal and Correctional Complex.

7. Defendant JACK CLEAVINGER, is the Director of the Department of Public Institutions.

8. Defendant KLAUS HARTMANN, M. D., is the Superintendent of the Lincoln Regional Center.

9. Defendant BENJAMIN COATES, M. D., is the head of the Security Building at the Lincoln Regional Center.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action pursuant to Rule 23 of the Federal Rule of Civil Procedure on behalf of all persons who have been transferred from the Nebraska Penal Complex to the Lincoln Regional Center Security Building, and all those persons who are presently subject to similar transfer pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

11. The class consists of a number of persons so numerous that joinder of all its members is impracticable. There are questions of law and fact common to the class. The position of the plaintiff as representative of the class is typical of the class. Plaintiff will fairly and adequately represent the class. Prosecution of separate actions by individual members of the class would result in inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the defendants. Adjudication with respect to individual members of the class would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

12. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

13. The questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair and efficient adjudication of the controversy. Since there is no conflict among the interests of the members of the class, members have no interest in individually controlling the prosecution of separate actions. This Court is a desirable forum in which to concentrate the litigation of the claims of the class, since it has the power to hear all the claims and to grant appropriate relief. There are not likely to be any difficulties in the management of a class action, since the whereabouts of all members of the class is known, and all members can easily be informed of this action.

STATEMENT OF FACTS

14. The Plaintiff, Charles Miller, was convicted in Douglas County, of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for one to three years, sentence to begin March 20, 1974. Plaintiff arrived at the Nebraska Penal Complex on March 25, 1974.

15. Plaintiff was transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, because he allegedly suffered from a mental disease or mental defect. Plaintiff, for the duration of his initial admission to the Nebraska Penal Complex, was given the routine physical examination, but received minimal or no psychiatric evaluation from a physician, psychologist or psychiatrist. Plaintiff's transfer to the Lincoln Regional Center, Security Building, came on or about May 31, 1974, without advance notice. He has been kept in custody at the Lincoln Regional Center, Security Building, continuously from his initial placement there until the time of the filing of this Complaint.

16. On numerous occasions, plaintiff has requested a transfer back to the Nebraska Penal Complex. In reply to such requests, plaintiff was either refused or received no reply. At no time has plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board for a *judicial* determination of his alleged mental illness. At no time did plaintiff ever receive a thorough psychiatric or psychological evaluation.

17. Plaintiff was transferred from the Nebraska Penal Complex according to the statutory procedure pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971),

as is stated in the Department of Public Institutions "Request for Transfer", a copy of which is attached hereto as Exhibit "A", and incorporated herein by reference.

18. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

19. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

20. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to NEB. REV. STAT. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when a physician designated by the Department of Corrections may make a finding that a person committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physicial or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to,

and for the care, custody and security of the person in such hospital or psychiatric facility. While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

21. For the Causes of Action, plaintiffs incorporate paragraphs 1 through 20.

FIRST CAUSE OF ACTION

22. Neb. Rev. Stat. §§ 83-179, 180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the plaintiff and other class members without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

23. Neb. Rev. Stats. §§ 83-179,180 (Reissue 1971) previously set out in the statement of facts are unconstitutional on their face as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than plaintiffs are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate, or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

24. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts are unconstitutional on their face and as applied by the defendants, because the statutory procedure does not provide plaintiffs the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiffs Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

25. Neb. Rev. Stats. §§ 83-179, 180 (Reissue 1971) as previously set out in the statement of facts, are unconstitutional on their face and as applied by the defendants,

in that they create a *standard* by which plaintiffs may be transferred to the Lincoln Regional Center, Security Building, which is *vague* and *overbroad*, which violates the plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiff on behalf of himself and all other persons similarly situated, prays that this Court:

1. Assume jurisdiction of this cause.

2. Declare that NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive plaintiff and the class he represents of their liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive plaintiff and the class he represents the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than plaintiffs, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive plaintiff and the class he represents the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the plaintiff's Due Process of Law in violating the Fourteenth Amendment to the United States Constitution.

D. Deprive plaintiff and the class he represents Due Process of Law in that plaintiffs may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overboard, in violation of the Fourteenth Amendment to the United States Constitution.

3. That a preliminary and permanent injunction be issued, enjoining and restraining defendants from engaging in any of the unlawful acts, and practices complained of in this Complaint.

4. That the defendants be enjoined and restrained from detaining plaintiff or the members of the class he represents, in the Lincoln Regional Center, Security Building, so long as defendants continue to deprive them of their constitutional right to due process of law and the equal protection of the laws.

5. That the costs of this action be assessed against the defendants and that plaintiff be awarded reasonable attorney's fees.

6. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

CHARLES MILLER, Plaintiff

BY: /s/ Tom Wurtz

LEGAL AID SOCIETY OF LINCOLN, INC.

800 Anderson Building
Lincoln, Nebraska 68508
(402) 435-2161

(Verification omitted.)

(Exhibit "A" Omitted.)

(Title omitted in printing.)

ANSWER

Come now the defendants and for answer to the petition filed herein:

1. Admit that plaintiff is in the legal custody of the defendants by virtue of commitment to the Nebraska Penal and Correctional Complex by the District Court of Douglas County, Nebraska.

2. Sections 83-179 and 83-180, R. R. S. 1943, providing for the handling of a person found to be suffering from a physical or mental defect apply only to persons who are already in the legal custody of the Nebraska Penal and Correctional Complex by virtue of due process of law and are in no way comparable to the commitment of persons to mental institutions from the population at large.

3. That the petition fails to state grounds upon which relief may be granted.

4. That except as herein specifically admitted, the defendants deny each and every allegation in said petition.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General

By Mel Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing)

JOINT STIPULATION OF FACTS

STIPULATION OF FACTS

By CHARLES MILLER, Plaintiff
and JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATS, Defendants

Come now the parties hereto, by and through their respective attorneys of record, and state and stipulate as follows:

1. Plaintiff Charles Miller is an 18 year old, black male resident of Lincoln, Nebraska. He is a United States citizen and a single person with no one dependent upon him for support. He was convicted in Douglas County of unlawful flight to avoid arrest while operating a motor vehicle, and was sentenced to the Nebraska Penal Complex for a period of one to three years. He began to serve his sentence March 20, 1974. He arrived at the Nebraska Penal Complex March 25, 1974.

2. Defendants are as follows:

A. Joseph Vitek is the Director of the Nebraska Department of Correctional Services.

B. Robert Parratt is the Warden of the Nebraska Penal and Correctional Complex.

C. Jack Cleavenger is the Director of the Department of Public Institutions.

D. Klaus Hartmann is the Superintendent of the Lincoln Regional Center.

E. Edwin A. Coates, M.D., is the head of the Security Building at the Lincoln Regional Center.

3. The Lincoln Regional Center is a state hospital operated by the Department of Public Institutions. Its purpose is for the treatment of the emotionally disturbed, mentally ill, mentally diseased, and those suffering from mental defects.

4. All prisoners that are voluntarily or involuntarily transferred from the Nebraska Penal Complex and Nebraska State Reformatory to the Lincoln Regional Center are confined at the Security Building, Lincoln Regional Center, which is the institution's maximum security facility.

5. Plaintiff, Charles Miller, was involuntarily transferred to the Lincoln Regional Center, Security Building, on or about May 31, 1974, where he was kept in custody continuously from his initial placement there until the time of the filing of this complaint.

Plaintiff, Charles Miller, was admitted to the Nebraska Penal Complex and involuntarily transferred from the Nebraska Penal Complex in accordance and compliance with the statutory procedure pursuant to Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

6. That at all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of Neb. Rev. Stat. §§ 83-179 and 83-180 (Reissue 1971).

7. Plaintiff, Charles Miller, on numerous occasions during the tenure of confinement at the Lincoln Regional

Center, Security Building, requested transfers back to the Nebraska Penal Complex.

8. Plaintiff, Charles Miller, has never been brought before a court of the State of Nebraska, nor a mental health commitment board for a judicial determination of the alleged mental illness.

9. Plaintiff, Charles Miller, after the filing of the motion for temporary restraining order herein on November 12, 1975, was transferred back to the Nebraska State Penal Complex, where he has been continually and is presently confined.

Dated this — day of March, 1976.

CHARLES MILLER, Plaintiff
By Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.
800 Anderson Building
Lincoln, Nebraska 68508
Tel: (402) 435-2161
Attorney for Plaintiff

JOSEPH VITEK, ROBERT PARRATT, JACK CLEAVENGER, KLAUS HARTMANN, BENJAMIN (EDWIN A.) COATES, Defendants
By PAUL L. DOUGLAS
Attorney General
By Mel Kammerlohr
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682
Attorneys for Defendants

(Title omitted in printing.)

COMPLAINT OF INTERVENER

The intervening plaintiff, LARRY JONES, for his Complaint and cause of action, alleges and states as follows:

1. The intervening plaintiff is a twenty-two year old male, and a resident of Lancaster County, Nebraska.

2. The intervening plaintiff was convicted in Douglas County of Robbery and was sentenced to the Nebraska Penal and Correctional Complex for three to nine years. Intervening plaintiff arrived at the Nebraska Penal and Correctional Complex on May 31, 1974.

3. Intervening plaintiff was involuntarily transferred to the Lincoln Regional Center, Security Building, in April of 1975, because he allegedly suffered from a mental disease or mental defect. Said involuntary transfer came without advance notice. Intervening plaintiff has been kept in custody at the Lincoln Regional Center Security Building continuously from his initial placement there on or about April of 1975, until the time of the filing of this Complaint.

4. On numerous occasions intervening plaintiff requested a transfer back to the Nebraska Penal and Correctional Complex, and in reply to such requests received no reply. At no time has intervening plaintiff been brought before a Court of the State of Nebraska, nor a Mental Health Commitment Board, for a *judicial* determination of his alleged mental illness.

5. Intervening plaintiff was involuntarily transferred from the Nebraska Penal and Correctional Complex to

the Lincoln Regional Center Security Building pursuant to NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

6. At all times material herein, defendants were acting under color of the statutes, laws, customs, and usages of the State of Nebraska, in particular under color of NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971).

7. At all times material herein, defendants and each of them, knew, or should have known, of the practices, acts and omissions alleged herein.

8. The duties of the defendants applicable to the transfer of the plaintiff from the Nebraska Penal Complex to the Lincoln Regional Center are as follows:

a. Pursuant to NEB. REV. STAT. § 83-179 (Reissue 1971) a prisoner is segregated at his initial admission for the purpose of being given a physical examination and thorough evaluation. He is kept apart from other persons committed to the division until he is known to be free from any communicable disease. The evaluation shall include such person's psychological, social, educational and vocational condition and history, and the motivation of his offense. A report shall be submitted on each such person to the chief executive officer of the facility containing the findings of the physical examination and evaluation. The report shall include recommendations regarding the facility to which such person should be assigned, the degree and kind of custodial control, and the program of treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training.

b. Pursuant to NEB. REV. STAT. § 83-180 (Reissue 1971), when a physician designated by the Depart-

ment of Corrections may make a finding that a percon committed to the division suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the division suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Division of Corrections and shall be returned to the division when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

c. Pursuant to NEB. REV. STAT. § 38-180 (Reissue 1971), when the physician or psychologist designated by the Director of Corrections finds that a person committed to the division suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department. The director shall make appropriate arrangements with other public or private agencies for the transportation to, and for the care, custody and security of the person in such hospital or psychiatric facility.

While receiving treatment in such hospital or psychiatric facility, the person shall remain subject to the jurisdiction and custody of the Division of Corrections, and shall be returned to the division when, prior to the expiration of his sentence, such hospital or psychiatric treatment is no longer necessary.

When two psychiatrists designated by the Director of Corrections find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

CAUSES OF ACTION

9. For the Causes of Action, intervening plaintiff incorporates paragraphs 1 through 8.

FIRST CAUSE OF ACTION

10. NEB. REV. STAT. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants in that such statutes and actions taken thereunder provide for the deprivation of liberty of the intervening plaintiff without prior notice and opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

11. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out are unconstitutional on their face and as applied by the defendants, in that such statutes and actions taken thereunder are in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that all other classes of persons involuntarily confined in mental health facilities other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board. There is no rational, legitimate or compelling state interest for treating plaintiffs in a different manner.

THIRD CAUSE OF ACTION

12. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, because the statutory procedures do not provide intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny the intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION

13. NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) as previously set out, are unconstitutional on their face and as applied by the defendants, in that they create a standard by which intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building,

which is vague and overbroad, which violates the intervening plaintiff's right to Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.

REMEDIES AND RELIEF

WHEREFORE, intervening plaintiff prays that this Court:

1. Declare that NEB. REV. STATS. §§ 83-179, 180 (Reissue 1971) are unconstitutional on their face, and as applied by defendants, for the defendants through their individual and collective effect of their acts and practices pursuant to these statutes:

A. Deprive intervening plaintiff of his liberty without prior notice and a meaningful hearing within the meaning of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Deprive intervening plaintiff the equal protection of the laws, in that all other classes of persons involuntarily confined in mental health facilities, other than intervening plaintiff and the named plaintiff, are afforded a judicial determination of the need for involuntary confinement in a mental health facility, through a Mental Health Commitment Board;

C. Deprive intervening plaintiff the right to be present at a hearing, present evidence, confront or cross-examine witnesses, all of which deny intervening plaintiff Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution;

D. Deprive intervening plaintiff Due Process of Law in that intervening plaintiff may be transferred to the Lincoln Regional Center, Security Building, on the basis of a standard which is vague and overbroad, in violation of the Fourteenth Amendment to the United States Constitution.

2. That the costs of this action be assessed against the defendants, and that plaintiff be awarded reasonable attorney's fees.

3. For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

LARRY JONES, Intervening Plaintiff

By: /s/ Tom Wurtz
LEGAL AID SOCIETY OF LINCOLN, INC.

800 Anderson Building
Lincoln, Nebraska 68508
(402) 435-2161

Attorney for Intervening Plaintiff

(Verification omitted.)

(Title omitted in printing.)

ANSWER TO INTERVENOR LARRY JONES

Come now the defendants and generally deny each and every allegation in the complaint of the intervenor filed herein.

Further answering defendants aver that the complaint fails to state a cause of action upon which relief may be granted.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General of Nebraska

By Mel Kammerlohr
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing.)

MOTION FOR SUMMARY JUDGMENT

Come now the defendants and respectfully move for a summary judgment herein for the reason that under any showing of facts within the purview of the pleadings filed herein the defendants would be entitled to judgment as a matter of law. The complaint fails to state a cause of action upon which relief may be granted and even a showing of disciplinary transfer (which is not pleaded) having a substantial adverse impact upon the prisoners would not violate any due process clause liberty interest of the prisoners.

WHEREFORE defendants respectfully move the court for a summary judgment in favor of defendants and dismissing plaintiff's complaint.

JOSEPH VITEK, et al., Defendants

By PAUL L. DOUGLAS
Attorney General

By /s/ Melvin Kammerlohr
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Attorneys for Defendants

(Certificate of Service omitted.)

(Title omitted in printing.)

MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT

In this three-judge court action the plaintiffs, prisoners in the custody of the Department of Corrections of the State of Nebraska, challenge the Nebraska statutory scheme which allows state prisoners to be summarily transferred to a state mental hospital.

The defendants have filed a motion for summary judgment, filing 34. No affidavits or documents were submitted with the motion, except a brief discussing two recent United States Supreme Court cases. In *Meachum v. Fano,* 44 U.S.L.W. 5053, — U.S. — (June 25, 1976), the court held that the due process clause did not require a hearing for a state prisoner who was transferred from one state correctional institution to another. In the companion case to *Meachum, Montanye v. Haymes,* 44 U.S.

L.W. 5051, — U.S. — (June 25, 1976), the court held that no hearing was required whether or not the transfer resulted from the prisoner's misconduct or was disciplinary or punitive.

The plaintiffs have submitted affidavits and a brief in opposition to the motion for summary judgment. They argue that *Meachum* and *Montanye* do not apply to the transfer of prisoners from a correctional institution to a psychiatric one and that due process principles require procedural safeguards for such a transfer; that the process by which Nebraska prisoners are subjected to confinement and treatment in a mental hospital constitutes a denial of equal protection, because noninmates are accorded elaborate procedural protections before such confinement and treatment are allowed; and that the standard for commitment of prisoners is unconstitutionally vague and overbroad.

Because the pleadings, discovery documents, and affidavits on file fail to establish that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, see Rule 56(c) of the Federal Rules of Civil Procedure, the motion will be denied.

The defendants' argument, based on the *Meachum* and *Montanye* cases, does not address the plaintiffs' claim that the transfer procedure denies equal protection and creates a standard which is vague and overbroad. The defendants are not entitled to a summary judgment on these issues.

As to the equal protection claim, the pleadings and the plaintiffs' affidavits establish as uncontested for the

purposes of this motion that the state has created one scheme for the psychiatric confinement and treatment of mentally ill prisoners and an entirely different one for the confinement and treatment of nonprisoners. On this record there is a genuine issue of material fact as to whether there is some basis for this unequal treatment. See generally, *Baxtrom v. Herold,* 383 U.S. 107 (1966).

With regard to the due process claim, it cannot be said that a summary judgment is in order, even if the two recent Supreme Court cases dealing with prisoner transfers are accepted as being as broad as the defendants argue in their brief. The complaints and affidavits of the plaintiffs are to the effect that (1) by reason of these transfers prisoners are subjected to compulsory psychiatric treatment which is not, at least in practice, authorized by reason of the criminal conviction, and (2) transfers are conditioned upon a finding that the prisoner has a mental disease or defect and cannot be given proper treatment in the prison. In this posture the case presents factual issues which are material to the limitations placed upon the express holdings in the *Meachum* and *Montanye* cases.

In the first place, the two Supreme Court cases apply only to actions which can be categorized as administrative in a broad sense[1] and which are authorized by virtue of

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1 By this is meant actions which relate to the administration of the prison. No reference is here made to the distinction between transfers which are administrative and those that are punitive or disciplinary. See *Meachum v. Fano,* 44 U. S. L. W. at 5056, n. 6.

the state law governing the custody of prisoners and are not otherwise prohibited by constitutional considerations:

> " . . . [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and to subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . "

Meachum v. Fano, 44 U.S.L.W. at 5056.

The facts surrounding the essential nature of the transfers involved in the instant case still present a material issue bearing upon whether the transfers are of the same genre as those involved in *Meachum* and *Montanye.* Nothing submitted by the defendants or otherwise before the court establishes as uncontroverted the conclusion, proffered in the defendants' brief that these transfers are mere administrative actions; to the contrary, the plaintiffs' characterization, adequately based upon the pleadings and affidavits, is that these transfers are in all respects commitments to the state mental hospital, which are factually no different than the commitments which have recently been subjected to severe due process restrictions. See *Doremus v. Farrell,* CV75-O-168 (U.S.D.C. Neb. December 23, 1975); *Lessard v. Schmidt,* 349 F. Supp. 1078 (U.S.D.C. Wis. 1972), vacated 421 U.S. 957 (1975). Cf. *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

Similarly, it would not be appropriate for the court to hold the due process issue foreclosed where, as here, allegations of a state law and practice conditioning the

transfer upon established contingencies are at issue. The *Meachum* and *Montanye* cases did not go that far:

> "The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. . . . "
>
> *Meachum v. Fano,* 44 U.S.L.W. at 5054.

A further factual development is necessary before this court can properly determine whether the holdings in *Meachum* and *Montanye* vitiate the plaintiffs' due process claims in this case.

THEREFORE, IT HEREBY IS ORDERED that the defendants' motion for summary judgment, filing 34, is denied.

Dated August 17, 1976.

BY THE COURT

/s/ Donald P. Lay
United States Circuit Judge

/s/ Warren K. Urbom
Chief United States District Judge

/s/ Robert V. Denney
United States District Judge

(Title omitted in printing.)

MOTION TO AMEND THE ORDER DENYING SUMMARY JUDGMENT

Come now the defendants and respectfully move the court to amend its order denying a summary judgment filed herein on August 24, 1976, to include the statement prescribed by § 28 U.S.C. 1292(b) that "in the opinion of the court such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" to enable defendants to request the United States Court of Appeals for the Eighth Circuit to permit an interlocutory appeal from said order as amended.

In making this motion defendants wish to emphasize that the issues involved in said motion for summary judgment and order denying the same are issues of first impression, they being based upon the two recent United States Supreme Court cases of *Meachum v. Fano,* 44 U.S.L.W. 53, — U.S. — (June 25, 1976) and *Meachum, Montanye v. Haymes,* 44 U.S.L.W. 50-51, — U.S. — (June 25, 1976), they also being cases of first impression.

Respectfully submitted,

JOSEPH VITEK, et al., Defendants

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NOTATION AS TO LOCATION OF THE DECISION AND ORDERS IN QUESTION

The Judgment, Memorandum of Decision and Order appealed from of the Three-Judge Court of the United States District Court for the District of Nebraska is set forth in the Jurisdictional Statement contained in the Appendix pages 1 through 25 thereof.